Smith's Food & Drug Centers, Inc. d/b/a Fry's Food Stores *and* Karen Medley *and* Kimberly Stewart *and* Elaine Brown *and* Shirley Jones *and* Saloomeh Hardy *and* Janette Fuentes *and* Tommy Fuentes.

United Food and Commercial Workers Union Local 99 *and* Kimberly Stewart *and* Elaine Brown *and* Karen Medley *and* Shirley Jones *and* Saloomeh Hardy *and* Janette Fuentes *and* Tommy Fuentes. Cases 28–CA–022836, 28–CA–022837, 28–CA–022838, 28–CA–022840, 28–CA–022858, 28–CA–022871, 28–CA–022872, 28–CB–007045, 28–CB–007047, 28–CB–007048, 28–CB–007049, 28–CB–007058, 28–CB–007062, and 28–CB–007063.

July 24, 2018

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On March 20, 2015, the National Labor Relations Board issued a Decision and Order in this proceeding, adopting the judge's finding that the Respondents did not violate the National Labor Relations Act[1] by refusing to honor employees' attempted revocations of dues-checkoff authorizations following expiration of the collective-bargaining agreement.[2] The Charging Parties subsequently filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On March 21, 2017, the court found that the manner in which the judge interpreted one aspect of the checkoff authorization agreement was incompatible with the Board's decision in *Frito-Lay*, 243 NLRB 137 (1979). Finding that the Board did not disavow the judge's interpretation, the court remanded this case to the Board for further consideration consistent with the court's opinion.[3]

On June 30, 2017, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position with respect to the issues raised. The General Counsel, the Charging Parties, and the Union each filed a statement of position.

The Board has delegated its authority in this proceeding to a three-member panel.[4]

Having considered the matter in light of the court's opinion and the parties' statements of position, we affirm our prior dismissal of the complaint. In doing so, however, we disavow the judge's interpretation of the authorization agreement that was the subject of the court's concern.

I. BACKGROUND

The Union represents a unit of thousands of grocery store employees working for the Employer at locations in Arizona, a right-to-work state. The Union and the Employer have a longstanding relationship and have been parties to a series of collective-bargaining agreements with provisions for voluntary union dues deduction. The Union's standard dues checkoff authorization agreement, in use since 1991, advises employees that it is "separate and apart from the Membership Application," and further states that:

> This authorization and assignment is voluntarily made in consideration for the cost of representation and collective bargaining and is not contingent upon my present or future membership in the Union. This authorization and assignment shall be irrevocable for a period of one (1) year from the date of execution or until the termination date of the agreement between the Employer and Local 99, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and Union written notice of revocation bearing my signature thereto.

Many unit employees chose to join the Union and sign the checkoff authorization agreement.

Central to this case are events following expiration of the parties' collective-bargaining agreement, in effect from October 26, 2003, to October 25, 2008. The parties were initially unable to reach a successor agreement. A hiatus period followed, during which the parties agreed to several short-term extensions of the expired collective-bargaining agreement before reaching a new agreement on November 12, 2009. From late July 2009, until the end of the hiatus period, a number of unit employees requested to resign from the Union. Some of them also attempted to revoke their checkoff authorizations. While the Union honored the resignation requests, it notified each requesting employee that his or her checkoff revocation was ineffective because it had not been submitted

[1] The complaint alleged that the Respondent Union violated Sec. 8(b)(1)(a) and 8(b)(2) of the Act, and that the Respondent Employer violated Sec. 8(a)(3), (2), and (1).

[2] 362 NLRB No. 36 (2015), incorporating by reference 358 NLRB 704 (2012).

[3] 851 F.3d 21 (2017), as amended March 23, 2017.

[4] Member Emanuel took no part in the consideration of this case.

during a window period between 30 and 45 days prior to their anniversary date of signing the authorization.[5]

Under Section 302(c)(4) of the Labor Management Relations Act, an employer may deduct employee dues and remit them to the union if "the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." Pursuant to Section 302(c)(4), a union can limit revocability of checkoff authorizations to window periods (1) at least once every year, for example, around the anniversary of their signing, and (2) prior to the expiration of the applicable collective-bargaining agreement. See *Frito-Lay*, supra at 138; *Atlanta Printing Specialties*, 215 NLRB 237, 237 (1974), enfd. 523 F.2d 783 (5th Cir. 1975). Because an authorization may automatically renew if it is not revoked during a window period, the expiration of a collective-bargaining agreement does not necessarily make it revocable at will. *Frito-Lay*, supra at 138. In addition, in the absence of a lawful union-security clause, an employee's resignation from union membership also does not revoke an authorization if the authorization agreement clearly establishes responsibility to pay dues regardless of union membership. See *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322, 328–329 (1991); *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367, 368 (1991).[6]

Here, the complaint alleges that the Respondents violated the Act by continuing to process employees' dues deductions after their resignations and attempted revocations.

II. PRIOR BOARD AND COURT PROCEEDINGS

A. The General Counsel's Allegations

The General Counsel's consistent theory of violation throughout these proceedings has been that the Respondents misapplied the authorization agreement in an effort to prevent employees from exercising their revocation rights. As examples, he cites the lack of mention of a revocation window period prior to contract expiration in the Union's 2009 letters denying employees' revocation requests, as well as the absence of evidence affirmatively showing that the Respondents honored revocation requests during the window period prior to the contract expiration in late 2008. The General Counsel argues that this course of conduct created ambiguity as to when employees could revoke the authorization agreement. In his view, this ambiguity rendered the authorizations involuntary and therefore revocable at will following the expiration of the collective-bargaining agreement in 2008. He also maintains that, in these circumstances, employees' resignations from membership should have served as revocations of their checkoff authorizations.

In tandem with these theories, the General Counsel has at times suggested that the language of the authorization agreement itself did not allow certain employees a revocation window period prior to contract expiration. However, when pressed by the judge to clarify his position at the hearing in this matter, the General Counsel repeatedly stated that he was *not* contesting the agreement's facial validity. Indeed, the General Counsel conceded at the hearing that "both parties agree that during the 15 day period before [the expiration of the contract in] October of 2008 that [employees] could revoke [their authorizations]." The judge asked the General Counsel whether he was moving to amend the complaint to allege that the authorizations were facially invalid, and the General Counsel responded: "we are not alleging that it is a facially invalid clause." Nonetheless, in his posthearing brief and later filings, the General Counsel attempted to pursue a facial-challenge theory that he had expressly disclaimed at the hearing.

B. The Administrative Law Judge's Decision

When deciding the complaint allegations, the judge expressly declined to consider the General Counsel's posthearing challenge to the authorization agreement's facial validity. He found such consideration unwarranted because the General Counsel explicitly refused to pursue that theory at the hearing and because late consideration of that theory would violate due process requirements. 358 NLRB at 709.

The judge also rejected the General Counsel's argument that, even apart from any challenge to its facial validity, the Respondents applied the authorization agreement to unlawfully deny the requests to revoke it. The judge noted that at trial the General Counsel conceded that "both parties agree[d] that during the 15 day [preexpiration] period before October of 2008 that [employees] could revoke [their authorizations]." Id. The judge further noted that under *Frito-Lay*, supra, authori-

[5] In some of the letters, the Union informed individual employees of their window period dates. In others, it asked the employees to contact it for the dates.

[6] Because the General Counsel, who is in control of the complaint, has not argued that *Frito-Lay* should be overruled and has shifted theories over the course of the litigation, Member Kaplan finds it unnecessary to pass on whether that decision was correctly decided. Similarly, the General Counsel has not argued that *Lockheed* and *National Oil Well* should be overruled, and today's resolution of issues potentially implicating those decisions also makes it unnecessary for Member Kaplan to pass on their correctness. See fn. 17, below. Member Kaplan believes, however, that these areas of Board law warrant reform and in a future appropriate case he would examine the correctness of each of the foregoing decisions.

zations are not automatically revocable at will during the hiatus period between contracts. He then found that the Union did not mislead employees by omitting mention of a window period prior to contract expiration in its 2009 letters, explaining that this window period had already passed and the parties had yet to agree on a new collective-bargaining agreement with a new preexpiration window period.[7] The judge also found, under *Lockheed*, supra, and *National Oil Well*, supra, that employees' resignations from the union could not function as revocations of dues deductions because the authorization agreement specifically stated that it was "separate and apart from the Membership Application" and was "not contingent upon [an employee's] present or future membership in the Union." 358 NLRB at 706–707.

The judge likewise rejected the General Counsel's related claim that the Union's course of conduct made the language of the authorization agreement ambiguous.[8] However, in finding the agreement sufficiently clear to avoid any ambiguity,[9] and despite the General Counsel's concession that the agreement allowed all employees to revoke their authorizations during the window period prior to contract expiration, the judge nonetheless proceeded to interpret the agreement as follows:

> In addition, employees who signed authorizations during the last year of the contract could revoke their authorizations upon the expiration of that contract.

Id. at 708.[10]

C. The Board's Decision

The Board adopted the judge's dismissal of the complaint, with a footnote emphasizing the lack of challenge to the authorization agreement's facial validity, or of any evidence that the Charging Parties sought to revoke authorizations during any possible window period. The Board further explained in the footnote that it was therefore unnecessary to pass on whether to defer to the Union's interpretation of the authorization agreement.[11] See 358 NLRB at 704 fn. 2.

D. The Court's Remand

The court remanded this case to the Board to address the judge's determination that his interpretation of the authorization agreement was consistent with *Frito-Lay*. The court was troubled by the judge's statement, referenced above, ostensibly suggesting that *only* "employees who signed authorizations during the last year of the contract could revoke their authorizations upon the expiration of that contract." The court found that the authorization agreement, as interpreted by the judge, was distinguishable from the ones at issue in *Frito-Lay*, supra, and *Atlanta Printing*, supra, which allowed *all* employees to revoke during both anniversary-of-signing and preexpiration window periods. The court thus found that the judge's reliance on *Frito-Lay* was misplaced, because "this is not a *Frito-Lay* case." 851 F.3d at 30.

The court acknowledged that in adopting the judge's dismissal of the case, the Board's footnote "hinted at a belief that the particular way in which the challenge was brought before it— i.e., as something other than a dispute about 'facial validity'—bore in some way on the applicability of *Frito-Lay*." Id. But the court found that the Board failed to fully articulate its reasoning. Because the Board did not clearly reject the judge's interpretation, the court concluded that if the Board wishes to reach the same result on remand, it "would need to explain how it could do so consistently with *Frito-Lay* and *Atlanta Printing* or justify any departure from those decisions."[12] Id. at 31.

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[7] The judge found no merit in the General Counsel's argument that employees had a statutory right to revoke their authorizations during window periods purportedly linked to the expiration of each short-term extension of the collective-bargaining agreement. The General Counsel did not further pursue this argument.

[8] He explained, "the General Counsel has failed to show that any ambiguity that employees might perceive resulted from the misleading acts of the Union rather [than] ambiguity inherent in the statutory language and the judicial gloss placed on that language." Id. at 708.

[9] In so finding, the judge stated that:

> [T]he authorizations were sufficiently clear to allow each employee who signed an authorization during the 2003-2008 contract the opportunity to revoke the authorization during the window periods preceding the yearly anniversary date that the employee signed the authorization.

Id. at 708.

[10] The judge included a similar characterization of employees' respective revocation opportunities in his presentation of the facts surrounding their resignations. Id. at 706.

[11] The Union argued in its answering brief that, contrary to the General Counsel's argument on exception (and consistent with the General Counsel's representation at the hearing), the authorization agreement did, in fact, include window periods prior to the "anniversary-of-signing" and prior to contract expiration. The Union added that its interpretation is entitled to deference, emphasizing that the language of the agreement tracks that of Sec. 302(c)(4).

[12] The court also remanded the argument that if authorizations were revocable at will following expiration of the collective-bargaining agreement, the Respondents should have additionally treated the resignations as revocations and ceased dues checkoff at the next possible window period. However, the court emphasized that because that argument presupposes that the language of the agreement did not comply with *Frito-Lay*, "it is unclear what, if anything, [the Charging Parties] independently stand to gain from [it]." Id. at 31. It stated that "[o]n remand, if the Board ultimately concludes that [the authorizations were revocable at will following contract expiration], the Board can then assess whether there is any need to address [the Charging Parties'] argument based on their resignations." Id. at 31–32.

III. DISCUSSION

To begin, we emphasize the narrow scope of the court's remand. In accordance with its instructions, our task is to address the apparent discrepancy between the judge's reliance on *Frito-Lay* (in rejecting the contention that the authorizations were revocable at will during the hiatus period) and his suggestion that the language of the authorization agreement allowed only some employees to revoke during a window period prior to contract expiration, as would be contrary to the dictates of *Frito-Lay*. We therefore explicitly clarify our view[13] that the General Counsel's representations regarding his theory of violation—specifically, that the Respondents misapplied the authorization agreement to prevent employees from revoking their authorizations—rendered the judge's interpretation of the agreement irrelevant. That interpretation was therefore improper.

There is no dispute that, at the hearing, the General Counsel unequivocally stated to the judge that he was not challenging the facial validity of the authorization agreement. There is also no dispute that the General Counsel specifically conceded at the hearing that the agreement allowed employees to revoke their checkoff authorizations during the window period prior to contract expiration, and that the General Counsel was instead pursuing a different theory of violation—one alleging that the Union's course of conduct improperly denied employees that window period. Thus, when the hearing closed, there was no issue before the judge concerning the facial validity of the agreement. However, in his posthearing brief and later filings, the General Counsel attempted to pursue a facial-challenge theory.

It is well-settled that a respondent must receive meaningful notice of the allegations against it and a fair opportunity to present a defense. See *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004). As the judge found, the General Counsel's late-raised facial challenge did not meet that requirement, as it amounted to an attempt—following the close of the hearing—to pursue a theory that he had explicitly disclaimed. At that point, the belated allegation did not allow the respondents due process, and was properly precluded.[14] Having found the facial challenge precluded, the judge lacked any basis to interpret the agreement.[15] Because the judge's interpretation was not relevant or necessary to any viable argument in this case, we explicitly disavow it. See, e.g., *Freeman Decorating Co.*, 335 NLRB 103, 103–104 (2001) (similarly disavowing judge's nonessential interpretation of unit descriptions and statements contrary to his conclusions of law).[16]

Moreover, the judge's interpretation was erroneous because there is no language in the agreement limiting the window period prior to contract expiration to employees who signed the agreement within a year of the contract's expiration. Indeed, the agreement excludes no employees from utilizing any possible window period.

Having fully addressed the judge's interpretation that troubled the court, we turn to the remaining issues.[17] The General Counsel argues that the Board should find on remand that the Union unlawfully applied the agreement and made its meaning ambiguous by (1) denying revocation requests purportedly made during the preexpiration window period in 2008, and (2) not advising employees in its 2009 letters of their previous right to revoke during that past window period.

We again find no merit in the General Counsel's position. First, there is no evidence that the Union ever refused to honor timely revocation requests. As the Board noted in its prior decision, none of the Charging Parties attempted to revoke—or even inquired about revoking—during any conceivable window period. All revocations occurred during the hiatus period between contracts. Second, the Union did not misrepresent the terms of the authorization agreement in its 2009 letters. Its instruction that each employee needed to revoke during their next anniversary-of-signing window period was not incorrect under the circumstances. At that time, there was

[13] Indeed, the court was correct in suggesting that the Board in its prior decision intended to distance itself from the judge's interpretation, as a corollary to its finding that the General Counsel did not challenge the facial validity of the authorization agreement.

[14] See, e.g., *Williams v. NLRB*, 105 F.3d 787, 790 fn. 3 (2d Cir. 1996) (finding charging party's request for ruling on the facial validity of a union-security clause precluded because the General Counsel, as the master of the complaint, did not make that argument); *Fineberg Packing Co.*, 349 NLRB 294, 296 (2007) (rejecting judge's determination that employee work stoppage was protected concerted activity, based on General Counsel's concession that work stoppage was not protected and refusal to argue that no-strike provision in parties' collective-bargaining agreement did not preempt the stoppage), enfd. sub nom. *Exum v. NLRB*, 546 F.3d 719 (6th Cir. 2008).

[15] And, the judge especially had no basis to interpret it in a manner contrary to the General Counsel's disclaimer, or in a way that might contravene Board law or conflict with the requirements of Sec. 302(c)(4).

[16] We also note that, by conceding that the parties agreed that the language of the agreement gave employees the right to revoke their authorizations during the two window periods, the General Counsel also conceded that the language of the agreement was not inherently ambiguous.

[17] In light of our finding that the General Counsel has not properly raised a facial challenge, we agree with the court that there is no need for us to address his contingent argument that employees' resignations also functioned as revocations due to deficiencies in the authorization agreement.

Member Kaplan believes that the principles set forth in *Frito-Lay*, *Lockheed* and *National Oil Well* warrant reexamination in a future case, but for the reasons stated in this decision, there is no need to do so here.

no collective-bargaining agreement in effect and thus no current preexpiration window period. Employees therefore suffered no detriment from the Union's response.

In sum, having determined that the judge erroneously interpreted the agreement, and that the General Counsel has failed to show that the Respondents misapplied it, we affirm the dismissal of the complaint.

IV. CONCLUSION

In considering this case on remand, the court instructed that we "do so consistently with *Frito-Lay* and *Atlanta Printing* or justify any departure from those decisions." As explained, the lack of a viable facial challenge to the Union's authorization agreement—coupled with the General Counsel's concession that all employees could revoke their authorizations during the window period prior to contract expiration—precluded any question of whether the agreement might materially differ from those at issue in *Frito-Lay* and *Atlanta Printing*. Accordingly, the judge's decision to interpret the agreement language was unwarranted; and his actual interpretation was incorrect. Finally, the evidence of employee attempts to revoke their authorizations occurred only during the contract hiatus. Thus, there is no basis for finding that *Frito-Lay* does not apply here and, more specifically, that employees had a right to revoke the agreement outside of the prescribed window periods. Having addressed the court's basis for remand, we again dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 24, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD